

International Brotherhood of Teamsters, Local Union No. 469, AFL-CIO (Coastal Tank Lines) and Alex Carlucci. Case 22-CB-5466

February 27, 1997

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On April 25, 1996, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an exception, a motion to strike portions of the Respondent's exceptions, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ except as modified below and to adopt the recommended Order as modified.

The judge stated that backpay awards for unlocated discriminatees would be held in escrow for 1 year from the date of the Board's Order, and if the discriminatees were not found during that time, any such award would be returned to the Respondent. The General Counsel, citing *Starlite Cutting, Inc.*, 284 NLRB 620 (1987), and *Groves Truck & Trailer*, 294 NLRB 1 (1989), excepts to this limitation of the escrow period. In accordance with this precedent, we find merit in the General Counsel's exception, and we shall modify the judge's decision and his recommended Order to provide that the 1-year escrow period shall begin either upon the Respondent's compliance by payment of the backpay for deposit into escrow or on the date the Board's Order, including enforcement thereof, becomes final, whichever is later.

Further, we sever and remand for recomputation the backpay awards for discriminatees Fred Ferro and Charles Corson, as recommended by the judge.

ORDER

The National Labor Relations Board orders that:

I. The Respondent, International Brotherhood of Teamsters, Local Union No. 469, AFL-CIO, its officers, agents, and representatives, shall make whole each of the discriminatees named below by paying to each of them the following amounts of backpay, with interest thereon as accrued from January 1, 1986, to

the dates of payment, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

Bobowski, Charles	\$1,302.00
Carlucci, Alex	5,343.00
Coleman, John	1,725.00
Dakin, Nicholas	138.00
DeWaard Arie	2,296.00
DeWaard, Wynand	6,055.00
Donahue, Roger	384.00
Duffy, Roy	853.54
Ford, Edward	10,839.00
Gillstrap, Wilton	2,517.00
Hansen, Warren	381.00
Harrison, Bruce	954.00
Kelich, Edward	1,329.00
Lang, Walter	11,165.00
Moses, Kenneth	303.00
Peterson, Albert	14.00
Ross, John H.	530.00
Russell, Eugene	132.00
Tinsman, Charles	12,407.00
Trinity, Leslie	2,377.00
Williams, Calvin	2,948.00
Wood, Jr., Joseph	73.00
TOTAL:	\$64,065.54

II. The amounts due to Roy Duffy, Bruce Harrison, Edward Kelich, Eugene Russell, Joseph Wood, Jr., and the beneficiary of Wilton Gillstrap shall be paid to the Regional Director for Region 22 to be held in escrow for a period not to exceed 1 year. The 1-year escrow period shall begin upon the Respondent's compliance by payment of the backpay for deposit into escrow or the date the Board's Order, including enforcement thereof, becomes final, whichever is later.

IT IS FURTHER ORDERED that the determination of the backpay due Charles Corson and Fred Ferro is severed and remanded to the judge for recomputation by the General Counsel pursuant to the judge's recommended Order.

Bert Dice-Goldberg, Esq., for the General Counsel.

Timothy R. Hott, Esq. (Hott & Margolis), for the Respondent.

Alex Carlucci, pro se for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on November 13 and December 18, 1995, and January 17 and 18, 1996, in Newark, New Jersey. In a compliance specification which issued on February 15, 1995, the Regional Director for Region 22 of the National Labor Relations Board (the Board) seeks certain backpay for a group of employee claimants who were the victims of unfair labor practices committed by the Respondent, International Brotherhood of Teamsters, Local Union No. 469, AFL-CIO

¹ We grant the General Counsel's motion to strike those portions of the Respondent's exceptions pertaining to the interpretation of the term "actual costs" in the Board's underlying Decision and Order, at 290 NLRB 44 (1988). The Respondent did not raise this issue in its answer to the compliance specification or at the hearing.

(the Union), and found by the Board in its Decision and Order appearing at 290 NLRB 44 (1988), enfd. mem. 897 F.2d 522 (3d Cir. 1990).

In the underlying proceeding in this case, the Board, affirming the administrative law judge, found "an arbitrary failure of the Respondent to inform employees it represents that it had agreed with their Employer that the employees were not covered by a pension plan." *Teamsters Local 469 (Coastal Tank Lines)*, 290 NLRB 44 (1988). Although the Board further noted that while it agreed "with the judge's statement that the Respondent's conduct in secretly exempting the employees from pension coverage and allowing the employees to believe for 10 years that they were covered constitutes 'an egregious breach of its judiciary duty,'" it rejected the remedy provided by the judge.

The judge had ordered Respondent to provide the owner-drivers involved with pension coverage equivalent to that which they would have enjoyed had contributions been made to the pension fund in accordance with the contract terms as the drivers-owners knew them to be. The Board concluded that inasmuch as the unlawful act was a failure to *inform* about pension coverage—not a failure to provide that coverage—the remedy recommended by the judge was punitive. Instead, the Board provided the following remedy:

[W]e shall order the Respondent to reimburse the affected employees the difference between the actual cost to employees to obtain comparable pension coverage individually had they been informed of the lack of the coverage in April 1976 and the cost of obtaining such coverage currently.

As the Board noted, "No violation of the Act occurred when the Employer and the Respondent agreed to exclude the affected employees. Employees affected by this lack of coverage would have had to find alternative coverage." *Id.* at 45. Thus, the consequence of Respondent's unlawful action—its failure to provide notice of the exclusion—deprived the employees of the opportunity to find alternate coverage. In determining that the additional cost, if any, of providing that alternate coverage after the affected employees did finally learn of their exclusion from pension coverage, was appropriate, the Board was mindful of the principal that in fashioning a backpay award, the goal should be "to recreate the relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976), cited by the Board with approval, in *Teamsters Local 469 (Coastal Tank Lines)*, *supra* at 45 fn. 6.

The Compliance Specification, the Answer, and the Motion to Strike Portions of the Answer

The compliance specification which issued on February 15, 1995, deals first with the backpay period. It begins in April 1976 when Respondent initially failed to inform employees of the lack of pension coverage. It ends in December 1985 when employees learned they had no pension coverage. The judge found, and the Board affirmed, Coastal Tank Lines (the Employer or Coastal) locked out the drivers at the subject Woodbridge (Avenel), New Jersey terminal in November 1985, and that Coastal was apparently going bankrupt. Respondent does not dispute that the Employer has

been out of business since approximately December 1985. These beginning and ending dates for the backpay period were subject to modification as follows: For any claimant employees hired after April 1, 1976, the period begins on their date of hire. For claimant employees who earlier died, retired, or learned before December 1985 that they had no pension coverage, their backpay period ended on a date earlier than December 1, 1985.

The specification also refers to two other dates which affect the end of backpay liability; the contribution ending date, which is the last date an employee earns pension contributions, and the comparison date, which is used as the measuring point in time to calculate the cost of an individual pension plan. The contribution ending dates for employees are either November 1, 1985, the date the Employer locked out its employees or the date the employees' employment terminated, whichever is earlier. The comparison date for employees is December 1, 1985, the date when employees became aware of Respondent's misrepresentation of pension coverage. It is an earlier date for earlier deceased and retired employees, and for employee claimant Kenneth Moses who informed the Regional Office that he learned he no longer had pension coverage on March 3, 1978.

Specific backpay period beginning dates for each employee appear in column B of appendix A. The contribution ending dates for employees are set forth in column C, and the comparison dates for each employee are set forth in column D, in most cases, December 1, 1985, with the exceptions earlier noted.

As the formula used to calculate the employee's monthly pension benefit, the specification relies on the Respondent's Summary Plan Description for Retirement Income Plan (the Plan or Respondent's Plan). An individual employee's monthly pension benefit was calculated by estimating the number of weeks and hours he worked during his respective backpay period and then multiplying the resulting total number of estimated hours in each year times the applicable pension contribution rate set forth in the collective-bargaining agreements between the Employer and Respondent in effect during the backpay period. Since the pension benefit contribution rates change on November 1 of each year, for calculation purposes, if the employee was employed during the entire year, he was credited with 42 weeks during the first 10 months and 8 weeks during the last 2 months. This results in the total yearly Employer contribution amount which was multiplied by a percentage rate to obtain the monthly benefit amount for that year. Using the sum of each year's benefit amount as the total pension benefit dollar amount an actuarial formula was applied to determine the costs of purchasing a pension annuity in that amount at the beginning and end of the backpay period.

In determining the beginning and ending date of employment for the employees, the specification relies on Respondent's due payment records because no Employer payroll records were available, Coastal having been out of business since approximately December 1, 1985. Likewise, in the absence of payroll records, the number of weeks and hours worked by employees was based on employee interviews and dues payment records. If an employee was employed a full year, it was estimated he worked for 50 weeks at 40 hours per week, based on employee interviews. In a full year of employment, 2 weeks per year were excluded for absentee-

ism due to illness, truck breakdown, vacations, etc., for which pension contributions would not have been made. If an employee was employed for less than a full year, he was credited for 40 hours per week for each week he worked in that calendar year.

Appendices B1 through B35 of the compliance specifications contain the Employer's monthly pension benefit calculations which were computed according to the formula set forth in Respondent's plan. Besides the discriminatee's name, date of birth, and starting and ending dates of his employment, each appendix also contains nine columns, numbered A through I. Columns A through F contain, for each year of employment by Respondent, the total hours, rates of Employer contributions, and the products of these hours and rates (which changed each November 1), culminating in a total figure of pension contributions for each year, listed in column F. Column G shows the pension percentage rate set forth in the Respondent's plan applicable to each year of a discriminatee's employment between 1976 and 1985, which varied between 1.8 percent (.18) and 2-1/4 percent (.0225). The product of the percentage rate and the Employer's pension contributions for each employee for each year of employment is then shown in column H, which is then rounded to the nearest 50 cents as required by the plan, in column I. Finally the sum of all the monthly pension benefits amounts for each year of employment is totaled at the bottom of column I to provide the total monthly pension the employee would have earned during the back period.

In the case of employee Roy Duffy, counsel for the General Counsel successfully offered a revised calculation for him at the outset of the trial, which substantially reduced his total monthly pension from \$215 to \$40.50. (G.C. Exh. 3.) The original specification had erroneously included more than 3 years of hours and pension contributions while Duffy had been employed by an employer other than Respondent. This reduction in a substantially reduced backpay claim on his behalf, from an initial claim of \$4531 to a revised figure of \$853.54.

In determining the backpay claim for each discriminatee, the Regional Director, on behalf of the Board, utilized the services of an actuary, the Wyatt Company, to compute the difference in purchase prices for each employee's purchase of an individual pension plan on two separate dates, the first being the date the employee's backpay period begins, either April 1, 1976, or a later date of hire if he first became employed later, and the second date being December 1, 1985, or an earlier date for a handful of employers who earlier died, retired, or disclosed on interview earlier knowledge of Respondent's misrepresentation.

In calculating the cost to purchase an individual pension on these two dates, the actuary was instructed to provide the employee with a payment of the yearly total benefit amount figured for each employee in column I of appendix B at age 65. In doing so, the actuary utilized the price for the purchase of individual pension plans being offered by the Metropolitan Life Insurance Company on the backpay beginning and ending dates for each employee. Appendix C lists the name, date of birth, initial date of purchase, later date of purchase, monthly benefit amount and, finally, the difference in purchase price between the two dates for each of the employer discriminatees. A review of appendix C shows that for 11 of the 35 discriminatees the difference in the purchase

price is \$0. As explained in the specification, this was so, "because interest rates went up, and, therefore, annuity purchase prices went down between the two dates. Thus even though each employee's purchase price increased due to an older age, the decrease in purchase price due to interest rates outweighs the increase for some employees and caused a decrease in actual purchase price." (G.C. Exh. 1(a) at p. 5.)

In its answer, Respondent disputes the Board's interpretation of the meaning of the words "comparable pension coverage" which appear in the amended remedy it provided to the discriminatees in its Decision and Order, 290 NLRB 44 quoted supra at 2. The Respondent asserts that the phrase "cannot be read to award or otherwise elevate the affected employees to a status of benefit entitlement which they could never have achieved under the terms of the pension plan as it was constituted on or about April, 1976 . . . or under any plan amendments." (G.C. Exh. 1(g) at p. 2.) Respondent argues that in order for coverage to be "comparable" it must be equal to or the same as that which was in existence at the time. Under the Respondent's pension plan, one condition of eligibility for receiving a pension at age 65 was having 10 years of service. Without such service, an employee had no vested right to a pension. Furthermore, the pension plan had a break-in-service provision under which service prior to a break of a certain duration would not count toward the service necessary to achieve vesting. Applying these two conditions to the discriminatees, none of them would have achieved sufficient service of 10 or more years to be eligible for a pension, even assuming that the Employer had made contributions on their behalf between 1976 and 1985 while they had been employed.

Respondent further argued in its answer that although, under certain circumstances, employees might have been entitled to a pro rata pension by totaling service with other employers where sister locals had a reciprocal pension arrangement with Respondent, or under a National Reciprocal Agreement with the International Teamsters Union, the Board failed to make the necessary determinations and computations to determine employee eligibility for a partial pension.

Respondent also argues, and makes factual claims as to many, if not all the discriminatees, that each of them had actual notice, or admitted actual notice, in or about 1977 or 1978 that the Employer was not making and was not obligated to make pension contributions on their behalf. Accordingly, there should be no liability for backpay to these employees. Respondent also specifically denied that any employee who was not employed on or before April 1976 is entitled to any backpay, listing which of the employees were thereby affected.

Finally, Respondent denied that it was appropriate to use its dues-payment records to determine beginning and ending dates of employment or the number of weeks and hours worked by employees. The Union did admit the mathematical accuracy of the actuarial computations which led to the difference in cost of purchase of an individual pension as described in appendix C, but reaffirmed its dispute with the specification's interpretation of the Board's Decision and Order. The Union, in its answer, also conceded liability in the amount sought of \$2377 to employee Leslie Trinity, who had retired on August 1, 1983, inasmuch as he was currently receiving a pension from the Union's plan.

On the basis of these assorted defenses, Respondent denied any liability for backpay to any discriminatee. Within a week prior to the hearing, counsel for the General Counsel served a notice of its intention (G.C. Exh. 2) and, at the outset of the hearing, moved, in writing (G.C. Exh. 4), to strike portions of Respondent's answer.

In various portions of its answer, Respondent asserts that various affected employees knew or should have known long before December 1985 that they had no pension coverage, including Alex Carlucci, Charles Corson, Roger Donahue, Edward Ford, Albert Peterson, and Calvin Williams, some of whom had allegedly received notice by certified mail in 1978 from the pension fund that the Employer could not make contributions on their behalf and, accordingly, their claims should be denied. The General Counsel contended that the issue of employee knowledge of lack of pension coverage had been litigated in the underlying unfair labor practice case and, in accordance with Board and court decisions it cites, could not be relitigated in a compliance proceeding. Since the Respondent did not introduce evidence of receipt of the letters in that proceeding, and was later precluded from reopening the record to do so, it could not offer such evidence in this compliance proceeding.

As to the defense, limiting backpay to only those employees employed on or before April 1976, counsel for the General Counsel accurately pointed out that as the Board found that the initial violation occurring in April 1976 continued over a period of 10 years, including union misrepresentations of the employees' pension status in successive collective-bargaining agreements distributed to the employees, Respondent should likewise be precluded from relitigating this issue. I granted the motion in full on the record, specifically noting Respondent's preclusion from offering any testimony addressing the issues on which answer was stricken and requiring Respondent to make offers of proof as to areas of testimony of employee witnesses called in order to further preclude such testimony. (Tr. 9-15.) These rulings are now reaffirmed.

Testimony Offered at the Hearing

Nancy Wilson, a field examiner and the Region's compliance officer responsible for preparing the compliance specifications, testified for the General Counsel that the Region interpreted the Board's Order directing computation of "comparable pension coverage individually" to mean determining what the individual employee would have derived from the Union's plan. To achieve that result she calculated the monthly pension benefit that the Respondent's plan would have yielded to the individual employees had contributions been made on their behalf during the employees' employment based on their years of employment with Coastal and its contributions and the formula in the plan. The Region also interpreted "currently" in the Board's Order to mean December 1985 when the Employer went out of business, or earlier in certain limited cases, as earlier described.

The Region did not consider or take into account other requirements of the Union's plan, such as the vesting requirement and break-in-service rule. They were not part of an individual comparable pension plan. Wilson testified that the Region reasoned that if an individual is going to go out on the market and purchase an individual pension plan, he would not purchase one in which he would have forfeited the

money he had paid into the plan if he didn't contribute for a 10-year period or if he stopped contributing for a period of time, such as in the break-in-service requirement. Furthermore, the vesting and break-in-service requirements are requirements that really apply to group pension plans, such as the Union's plan, and not to individual plans. Finally, to apply the vesting requirement to younger employees among the discriminatees who might not be vested during the back-pay period, but who could become vested based on their entire work history, would have been unfair to them and therefore unreasonable as an interpretation of the Board's remedy to be applied to the discriminatees as a whole.

Wilson further testified that the Region derived its formula for determining the monthly pension benefit from the Union's plan, and then took that monthly benefit to an actuary to calculate the difference in costs of deriving that benefit on two separate dates, as earlier described in my review of the elements of the specification. Since the actuary was only provided the appendices B1 through B35 covering each of the 35 discriminatees and was not supplied with any information relative to the Union's plan, counsel for the General Counsel readily stipulated that the actuary did not consider the plan's requirement's of vesting and break in service in computing the costs of purchase of an individual pension on the two dates indicated. The actuary then only provided the difference in cost if any, as noted in appendix C.

The Employer's contribution rates were obtained from the successive collective-bargaining agreements and addendums in effect between it and the Union from 1976 through 1985, and the percentage benefit rates were obtained from the pPlan booklet from 1976 and 1981, all of which documents were received in evidence.

Wilson also testified that when she sought to obtain the Employer's payroll records to determine the beginning and ending dates of employment for the discriminatees, and learned they were not available, she used the Union's due payment records, showing its receipt of checked off dues remitted by Coastal, for these dates. These dues records provided specific dates of employment with the Employer; social security reports provided earnings from named employers for particular years, but did not breakdown such earnings on a quarterly basis as they previously did. The same thing held for employee W-2 statements when they were provided for Wilson's review. Wilson noted that while the Union in its answer disputed that dues-payment records were appropriate to determine periods of employment by Coastal, the Union failed to provide any alternate method to use to determine employment in the absence of the original payroll records.

During Wilson's cross-examination, Respondent's counsel denied, in response to a question I posed, that it had any responsibility to prepare an alternate formula, showing the effect on the cost of an individual pension, of including the Union Plan's vesting and break-in-service requirements, and that it was the Board's responsibility to have properly interpreted the original decision. Counsel for the General Counsel took exception, arguing that it was Respondent's burden to produce an alternative computation in their answer, in which it flatly denied that anyone, other than Trinity, was eligible for backpay (Tr. 76). Wilson, in a later response to Union counsel's questioning, also noted the Union's failure to have

submitted alternate actuarial figures that would have included a vesting requirement for an individual pension plan (Tr. 82).

Wilson went on to note that in 1993 (by letter dated December 6, 1993, later received in evidence as R. Exh. 1) she had provided the Union's counsel with a payment demand letter, with attachments (the third containing backpay and interest calculations to December 31, 1993, for each discriminatee). The Union's counsel had responded by asking for an extension of time to file an answer to the demand to permit its own actuary to review the figures and finally informed Wilson that he had no problem with the Wyatt Company's figures. In that letter, consisting of three typed pages plus three attachments, Wilson provided a detailed explanation, since set forth in the compliance specification and her own direct testimony, as to the methods and formula the General Counsel used in costing the backpay figures.

Wilson was asked at one point whether she had inquired of discriminatees if any of them had, in fact, purchased individual pension coverage. She replied she had not, and explained that the Board had not provided for reimbursement to employees for out-of-pocket pension costs. Wilson also noted that such a remedy made no sense since at the time of the initial violation the Coastal employees had been led to believe that they had pension coverage and thus would not be going out and buying their own coverage. Furthermore, as Wilson also noted, in preparing the specification, such out-of-pocket costs (e.g., incurred at the time the employees learned in 1985 they never had pension coverage) were never considered and it was never raised as a defense by Respondent in its answer.

As to one discriminatee, Edward Kelich, Wilson explained that a footnote provided by the actuary with respect to Kelich's award, where the actuary provided an alternative \$0 award to Kelich if the date of the record purchase was August 1982, was based on a misreading of Kelich's appendix B22 which correctly provided a start date of April 1, 1976, and an end date of July 20, 1982, when he left Coastal's employ and thus the ending date for purposes of calculating his monthly pension benefit. The correct award figure for him is, as listed in appendix C, \$1329. Although Kelich could not be located more recently, back in 1992, Kelich informed Wilson he was on his way to Kuwait to work after the Gulf War. Thus, there was no basis for considering that he had retired. At the time of the hearing Kelich was 59 years old.

As to those employees who could not be located when the specification was prepared, as Wilson noted, their awards, if any would be held in escrow for them by the Region for 1 year from the date of the Board's Order, and if not located during that time, would then be returned to Respondent. See *Starlite Cutting*, 280 NLRB 1071 (1986), for Board adoption of this procedure.

Respondent called a number of witnesses in its defense. The first was Howard Hauser, the Union's pension fund actuary, who, on the Union's counsel application over the General Counsel's objection,¹ I found qualified as an expert wit-

ness capable of providing opinions as an expert in the area of pension and pension benefits.

Hauser distinguished between a defined benefit plan and a defined contribution plan, both of which provide deferred benefits to employees. The Union's plan or fund is a defined benefit plan, typical of jointly administered Taft Hartley Funds in this regard. The features of a defined benefit plan in general is that it has no minimum or maximum benefit, it is designed to provide income for life on retirement, and all the benefits have certain eligibility requirements attached to them, primarily age and service. The main feature of a defined contribution plan, which Hauser also described as an account balance plan, is that every dollar contributed is credited to the participant's account. That contribution plus interest earned over time constitutes the guaranteed payout. It is not Federally regulated, as are the defined benefit plans, by the Employee Retirement Income Security Act of 1974 (ERISA), it functions very much like a savings account with tax deferral features. It is affected by the age at which such a plan is purchased but does not have the long service requirements typical of defined benefit plans. Historically, they are called annuity plans, but Hauser characterizes them as account balance plans which permit the withdrawal of the accumulated credited amounts plus interest on achieving eligibility.

A common feature of both types of plans are that benefits are deferred and cannot be taken out until one achieves eligibility by reaching a certain age and retires.

Hauser's main function as actuary of the Union's plan, among others, is in valuing the benefits to be provided. In designing benefits and contribution levels to achieve those benefits, for defined benefit plans such as the Respondent's, Hauser will consider such factors as the earnings on investments, the mortality of the particular covered group of employees, and the turnover among them. These are not considerations in defined contribution plans in which the benefits amounts are fixed, determined solely by the amount contributed. Regarding defined benefit plans, the higher the turnover, the fewer the number of beneficiaries who will be eligible at age 65, the normal retirement age for entitlement to a pension, and thus the greater the benefit the plan can afford to grant.

Hauser had examined the appendices B1 through B35, prior to his testimony and had no dispute about their accuracy in setting forth the information about the potential monthly pension as applied to each discriminatee. In describing the benefits amounts appearing in these appendices, Hauser characterized them as benefits resulting from a defined benefit plan with no service requirement, using single premium annuities for a defined benefit plan. This was so, according to Hauser, because a number of the discriminatees, indeed the majority, had years of service which did not total 10 years.

Hauser noted that for the calculations which resulted in listing of benefit amounts in the B appendices, an assumption was made that Employer contributions were made on behalf of the discriminatees, to the Union's plan. He further noted that only receipt of contributions from a contracting employer, based on at least 1000 hours of service in 1 year, can result in crediting that employee with a year of service. This rule was mandated under ERISA. The Union's plan own rule

¹ That objection did not dispute Hauser's qualifications as an expert in the field but his objectivity to provide unbiased expert opinions in view of his 30-year relationship as a professional actuary on retainer by the Respondent, among many other clients. Later cross-examination disclosed that Hauser was being paid a retainer of \$8000 a quarter for his services as actuary for the Union's pension and annuity funds.

requires 1600 hours in 1 calendar year, but one can earn quarter years by 400 hours of such service.

Witness Hauser also noted that two discriminatees, Alex Carlucci and Walter Lang, had nearly identical time of service with Coastal, in each case totaling 9 years, 7 months (but totaling 10 years because of the 1000 hours per year requirement, assuming contributions had been made on their behalf by Coastal), yet in the specification Carlucci is awarded \$5343 and Lang is awarded \$11,165. This substantial difference is based solely on the difference in age between the two at the time of the supposed purchase on the second date of the individual pension plan, Lang being older by 6 years. Under the Union's plan, Lang would have received a greater pension benefit of only \$25.50 a month because his total contributory hours slightly exceeded Carlucci's. This example shows that the difference in age between discriminatees is a significant factor in evaluating the cost of purchase of an individual pension but play no role in the design of, and in determining benefits under, a plan like Respondent's.

A further requirement for receipt of benefits under the Union's plan is that an employee must have at least 2 years of service under its plan or a reciprocating plan of a sister local in order to receive at least partial credit for that time in determining eligibility for a pension based on a total of 10 years of credited service. No such requirement was applied to compute potential benefits for the discriminatees under the Board's formula.

Furthermore, Hauser pointed out that a number of the discriminatees either had breaks in service, or would have incurred a break in service sufficient to lose the prior years of service by a date beyond their actual service, thus disqualifying their existing years of service toward a pension under the Union's plan. One was deemed to incur a break in service under the Union's 1976 plan if the sum of consecutive 1-year breaks in service, in which one had less than 500 hours of service, was greater than the sum of prior years of service. Under the 1981 plan, the definition of a year's break in service now required less than 400 hours of service.

During his cross-examination, Hauser agreed that individuals could not purchase the benefits available under the Union's plan; it is a group plan, which requires contributions to be made from a contracting employer. If contributions are not required to be made by an employer, there is no crediting of service toward eligibility for a pension. Thus, none of the discriminatees in this case, even those with at least 10 years of service, are eligible for a union pension, because there was no requirement that their Employer Coastal, make contributions to the fund on their behalf. If, however, contributions are required to be made by an employer and are not because of a refusal or failure to contribute, an employee may still be credited with service under ERISA. And employees who are promoted to supervisory positions with a contributing employer will still receive credit for such service.

After recalling the Region's compliance agent, Nancy Wilson, and establishing that her backpay demand letter to the Union's counsel dated December 6, 1993, was the first formal notice of a specific dollar claim in this case, Respondent successfully moved to amend its answer to preclude interest on any backpay award from the issuance of the enforcement order by the Third Circuit Court of Appeals, on January 31,

1990, until the date of the Board's formal demand for specific moneys to satisfy compliance, on December 6, 1993.

During further examination of Wilson conducted by the General Counsel, Wilson testified that Respondent at no time between 1990 and 1993, informed the Region that it was prepared to pay anything near to the amounts which the Board would be seeking under the Board's Order and court decree. By an earlier letter dated April 30, 1991, Wilson had provided an explanation to Union Counsel Hott "of how [she] will tentatively compute the amount of monies due under the terms of the Board's Order as enforced by the Third Circuit Court of Appeals." (G.C. Exh. 10.) All owner-operators employed between 1976 and 1985 would be entitled to compensation, whether "vested" or not under the Union's plan. The compliance period would run from April 1976 to December 1985. The actual compliance amount will be the difference between the cost of an individual pension at the beginning and end of the compliance period, with interest accruing from the end of the period, to the date of payment. She would utilize the Union plan's formula and contribution rates in the collective-bargaining agreements in determining the value of each individual's pension and then utilize an actuary to figure the cost of obtaining personal pension coverage and the difference in cost. She provided examples of an application of the formula and a list of owner-operations and those the Union had contended were the only ones affected and suggested he call her with any questions. As noted, Hott never sought further information or informed Wilson of a willingness to comply, or even disputed the period of interest calculations.

Hauser was later recalled as a witness by Respondent. He was now asked if the Union's pension plan was comparable with the single purchase annuity-type plan utilized by the Board in its specification. Over Government objection, I permitted Hauser to respond as an expert to the question. Hauser responded that the costs were not comparable. In the Union's plan, benefits are partially funded by termination or turnover gains, i.e., by employer contributions made on behalf of employees who never achieve vesting entitlement to benefits because of death or otherwise leaving employment under the plan. In Hauser's view the termination discount is extremely important. The Union's plan has achieved substantial increases over the last 10 or 20 years that were funded by investment gains, mortality gains, and termination gains. It is highly unlikely that the single purchase premium annuity utilized by the Board has a termination factor. Indeed, as Hauser had earlier explained there is no discount for tomorrow, because everyone is vested or entitled to a benefit once a contribution has been made. The only factors that would effect the return is the change in the rate of interest on contributions and mortality. With greater interest earnings, there will be gains and if the annuitants die earlier there also will be gains. Without a termination factor, the costs associated with purchasing the individual annuity or pension would be unreasonable and overstated.

Another witness for Respondent was William Giannico, the administrative manager for the Union's fund for the past 27 years. He collects the contributions from employers required by the collective-bargaining agreement and dispenses the benefits in accordance with the trust documents. Until 1982 all records kept were manual and since that time they have been kept on computer with prior records loaded onto

the computer as well as retained in hard copies at the fund's office.

Giannico described reciprocal agreements which the Local 469 pension fund has with the pension funds maintained by other local unions as well as with the International under a separate reciprocal agreement. Most funds under the International agreement require 15 years' minimum combined years of service, with a minimum of 8 quarters, equivalent to 2 years of pension credits, that an individual must acquire under the plan of a local union in order for that Local's pension plan to be able to participate in a pro rata pension.

Giannico processes pension applications, gathering past service credits, preparing a calculation of pension benefits, and sending it to the actuary for certification. In compiling the necessary data, Giannico utilizes employer contribution reports and earnings statements obtained from the Social Security Administration. Coastal Tank Lines was a contributing employer from April 1976 until it went into chapter XI bankruptcy in the early to mid-1980s.

Giannico ran a check of the Union's records to determine the eligibility of any of the discriminatees to a union pension. In doing so he referred to computer records, and any records of correspondence with the discriminatees, employers, or sister pension funds related to inquiries about pension credits.

The union fund's manual records contain information about 5000 individuals with less than 5 years of service; most of them have terminated prior to vesting. The computer records show roughly another 1000 individuals in this category. The funds contain records of another 1300 active individuals, three quarters of whom have vested and the remainder of whom are currently actually participating, but not yet vested.

In terms of vesting, the Union plan's requirement of 10 years was changed effective January 1, 1984, to require at least 5 but less than 10 years to become eligible for a pension at age 65, but only for credits earned after January 1, 1984. For most of the discriminatees, older in years, whose employment did not continue much beyond 1983, the 10-year vesting requirement would govern their eligibility for a pension under the Union's plan.

Giannico's testimony from this point involved a review of the records in the union funds' files relating to the discriminatee's pension credits and eligibility. This testimony shows that of the 35 discriminatees, 5 had sufficient years of service under the Union's plan, to have been eligible to receive a union pension but for the failure of their inclusion for pension coverage under the collective-bargaining agreement and the absence of any pension contributions retained by the union plan on their behalf. These discriminatees are Edward Ford, Walter Lang, Charles Tinsman, Alex Carlucci, and Bruce Harrison. The first four had at least 10 years of service, and Harrison had 5 years of service after 1983. The Union conceded that if Harrison continued to accumulate 1000 hours of service in 1996 he would also vest under the Union's 10-year vesting rule. I have previously noted that Leslie Trinity was receiving a union pension, and the Union did not dispute his backpay award. In addition, Charles Corson had 8 years of pension credits, from 1978 to 1985. All other discriminatees had fewer years of service with Coastal, among them Charles Bobowski who had 5-1/2 years.

Five discriminatees were also called as witnesses by Respondent.

Charles Bobowski testified that he had worked for Coastal from 1962 to 1981. The record evidence and the underlying decision in this matter, however, shows that it was not until Coastal acquired P. B. Mutrie which had a collective-bargaining relationship with the Union, that Coastal itself commenced a relationship with the Union. It was then, in 1976, that Bobowski and other discriminatees employed by Coastal at the time, became part of the bargaining unit and were mislead about their lack of coverage under the Union's Pension plan. Bobowski has not worked regularly since 1982, but has continued to receive some earnings for jobs using his own truck. Bobowski was approximately 60 years old when he testified in January 1996. The Union has no record showing any contributions from any employer including Coastal into the Union's pension fund on Bobowski's behalf. These records do show he was a participant in the Union's welfare plan during the years of his employment by Coastal.

During Bobowski's testimony, it became clear that as owner-operators employed by Coastal, Bobowski, and the other discriminatees received two separate checks, one representing salary as the driver, from which all usual deductions were taken, and the other a sum paid him for the lease of his truck, computed as a percentage of gross revenue generated by use of the truck.

Charles Corson, 74 years old at the time he testified on January 17, 1996, last worked for Coastal in 1985 when the Company ceased operations. He had been hired sometime in 1977. Corson testified that prior to his employment by Coastal, he had worked for P. B. Mutrie as a part-time company driver for 10 years before Coastal purchased Mutrie. He also worked part time for Mutrie as an owner-operator. For the time he was a company driver for Mutrie, Corson testified that the employees were represented in collective bargaining by a sister teamsters local union with offices in Chester, Pennsylvania. Corson had never written Local 469 asking them to determine his reciprocal pension credits earned in employment while a member of or represented by a sister local. Thus, Local 469 had no record of any reciprocal covered employment. Corson's social security earnings records also show earnings from employment as a driver by P. B. Mutrie Motor Transportation, Inc., c/o Coastal Tank Lines, Inc., exceeding \$13,000 in 1974 and almost \$10,000 in 1975 at times when Respondent's counsel conceded that Mutrie had a collective-bargaining agreement with the Union which required contributions into the Union's pension fund on behalf of company drivers, not owner-operators. The record, however, fails to show whether Corson was a company driver employed under that agreement. The answer to this question would help in determining whether Corson had accumulated 10 years of service, like the five other earlier named discriminatees, for which he would have a vested right to a union pension had contributions been made by Coastal and other reciprocating employers.

Yet there is another aspect of Corson's employment history which, in my judgment, must result in an adjustment of Corson's backpay claim. In appendix B7 of General Counsel's Exhibit 1 the Region credits Corson with 2000 hours of work in 1978 for Coastal, providing him with a monthly pension amount for that year of \$25.50, rounded to the nearest \$.50. This figure when added to the other figures rep-

resenting monthly pensions in 1977 and 1979 through 1985 results in a total pension benefit of \$424.50 which was provided to the actuary to compute the difference in cost of providing an individual pension of this amount between Corson's starting employment date of October 1977 and his employment ending date of December 1985. In appendix C the difference in purchase price, and thus Corson's claimed backpay award, is \$16,434.

As earlier noted, in the absence of Coastal payroll records, the Region relied on the Union's dues-payment records, as well as social security reports, to determine the beginning and ending dates of the discriminatees' employment by Coastal (Tr. 36-37). Corson testified that even when he had been laid off from Coastal he continued to pay union dues while employed by other firms which leased their trucks to Coastal. Thus, the Union's dues records would have reflected dues payments on Corson's behalf in 1978. But the social security report for Corson which Respondent introduced into evidence as Respondent's Exhibit 4 shows at pages 12-14 no earnings received from Coastal in 1978 and \$17,991.05 in earnings received from Louis Guido and Robert Sauer, Partners in 1978. This earnings figure would appear to be incompatible with the Region's claim of 2000 hours (or any hours) while employed by Coastal in 1978. (Compare, e.g., Corson's total earnings of \$22,900 while employed for 2000 hours by Coastal in 1979, also shown in the social security earnings report.)

When confronted with this rebutting evidence, counsel for the General Counsel promised to provide a response the following day when Compliance Officer Wilson would be available (Tr. 408-409). On the following day, January 18, 1996, the last day of the hearing, no response was forthcoming. I am persuaded that the compliance specification when it lists 2000 hours of work for Corson with Coastal in 1978, resulting in a monthly pension benefit that year of \$25.50, is in error, and has been overcome by records produced by Respondent, which the Region also reviewed and on which it relied, in part. Accordingly, the Region's specification can show only a total pension benefit for Charles Corson of \$399. This revised monthly benefit figure, in turn, will result in a modification of the difference in purchase price prepared by the actuary consultant, which constitutes the backpay award appearing in appendix C of the specification. I will deal with this change in my recommended Order, *infra*.

Fred Ferro testified that he suffered an injury while working for Coastal in 1979, went out on disability in 1979, and has not worked since. Under the Union's pension plan, totally and permanently disabled employees are only entitled to a pension benefit if they have at least 10 years of credited service. It is unclear from the record whether the Region was aware of Ferro's disability and, further, whether its actuarial consultant was made aware of the fact that Ferro ceased work in 1979 because of an apparent permanent disability in computing the cost of obtaining a monthly pension of \$54 for Ferro in 1985. Counsel for the General Counsel suspected such information might have had a bearing on the cost figure. (Tr. 434.) On this latter question counsel for the General Counsel also promised to obtain an answer by the following day (Tr. 434), but failed to do so. I will also deal with the impact of this testimony on Ferro's award in my recommended remedy.

Warren Hansen testified that neither before 1976 when he started working for Coastal nor after 1978, when he ceased working for Coastal, did he perform any work for any company that had a union or made pension contributions to a teamsters fund on his behalf.

Charles Tinsman testified, in corroboration of the allegation made on his behalf in the specification, that he worked full time as an owner-driver for Coastal for 10 years from 1976 to 1985. Tinsman testified he had worked for Mutrie as an owner-operator, for 20 years prior to 1976, and for a good portion of that time he had been a member of the Union paying union dues under a checkoff from his pay. Tinsman did not believe he was covered by the Union's agreement with Mutrie, which covered only company drivers. Over his employment Mutrie had 15 to 20 owner-operators and maybe 10 drivers who drove the Company's trucks. He then became employed by Coastal on Mutrie's merger into Coastal in 1976.

ANALYSIS AND CONCLUSIONS

Both the General Counsel and Respondent filed timely posthearing briefs, and they have been carefully considered. In its brief, Respondent, for the first time, raised an issue which it had not previously raised in its answer to the specification nor in testimony or arguments presented at the hearing. While incorporating this argument under a general heading, "The Backpay Specification is not Demonstrative of Comparable Pension Coverage," Respondent now, for the first time, argues that the phrase "actual cost" appearing in the Board's remedial order, requiring that the Union reimburse the employee's the difference between the "actual cost" to obtain comparable coverage individually had they been informed of lack of coverage in April 1976 and the cost of obtaining such coverage currently should be read as meaning that only these employees who actually purchased coverage on learning, in 1985, that no contributions and therefore no coverage existed for them under the Union's plan, be entitled to any backpay. Since there was no testimony offered by the General Counsel during the course of the hearing showing any employee actually purchased any coverage, any award for them would require the Union to pay these employees for an expenditure which they actually never made, thus creating a windfall for them and constituting an unenforceable punitive award.

By motion dated February 27, 1996, a week following the receipt of Respondent's posthearing briefs, counsel for the General Counsel moved for an order striking those portions of that brief at 4, 7-10, and 13 in which Respondent raised the issue of "actual cost" and the lack of any evidence of actual expenditures by individuals to obtain comparable pension coverage, on the basis that these matters were not raised in Respondent's answer or at the compliance hearing, thus, violating Board precedent and prejudicing the General Counsel, and citing Section 102.56(b) and (c) of the Board's Rules and Regulations and three cases in support.

Respondent filed answer to the motion making three arguments in opposition. First, Respondent argues that by asserting in its answer that the Union is not liable for backpay because the interpretation of the Board's Decision and Order is based on an incorrect assumption of its meaning it was signaling that it was contesting the entire interpretation of the Board's Decision and Order. Respondent, however, fails to

note that its argument is grounded specifically on its dispute with the Region over the interpretation of the operative words, "comparable pension coverage," appearing in the Board's remedial order. (G.C. Exh. 1(g), pp. 18-19.) Nowhere in the answer is there any mention of a dispute over the Region's failure to interpret "actual cost" as requiring proof of an actual outlay of moneys to purchase an individual pension by the discriminatees.

Second, Respondent argues that its argument about "actual cost" in its posthearing brief constitutes "fair comment" on the evidence or its lack as produced by the General Counsel at the hearing. This argument begs the question, since comment may be deemed "fair" only if it meets the pleading requirements in a backpay proceeding and this argument does not deal with the claimed deficiency. Indeed, in so far as the General Counsel was never fairly apprised of Respondent's "actual cost" defense, it had no reason to introduce any evidence or arguments to rebut it and was thus prejudiced by Respondent's attempt to introduce this issue only by way of its posthearing brief.

Finally, Respondent argues that the Board has previously held that a general denial in a Respondent's answer is sufficient to place that which is denied into issue, citing in support, *Baumgardner Co.*, 298 NLRB 26, 27 (1990), and *Dews Construction Corp.*, 246 NLRB 945 (1979). Respondent misconstrues these decisions. What the Board actually held with respect to a general denial being sufficient was that such a denial "is sufficient to place interim earnings into issue as that information is generally not within the knowledge of the Respondent. *Dews Construction Corp.*, 246 NLRB 945 (1979)." *Baumgardner Corp.*, supra at 28. Accordingly, it denied the General Counsel's motion to strike Respondent's answer insofar as it constituted a general denial to the paragraph of the specification setting out the discriminatee's interim earnings. However, and more to the point, the Board in *Baumgardner* granted the General Counsel's Motion for Summary Judgment as to all other allegations in the backpay specification, because the Respondent's general denial was substantively deficient as to all matters within its knowledge, including the various factors entering into the computation of gross backpay. As to these matters the answer must be specifically drawn and a general denial does not suffice. *Baumgardner*, supra at 27. The Board set forth, in pertinent part, Section 102.56(b) and (c) of its Rules and Regulations, on which it relied for its conclusions. They provide as follows:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. . . . As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the Respondent's posi-

tion as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*— . . . If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent shall be precluded from introducing any evidence controverting the allegation.

See also *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 37 (1991), where the Board held as follows:

Respondent may not contest the formula based on its foremen's hours contention since it did not raise the matter in its answer. See Section 102.56(b) and (c) of the Board's Rules and Regulations; *Airports Service Lines*, 231 NLRB 1272, 1273 (1977); *Baumgardner Co.*, 298 NLRB 26 (1990).

The General Counsel cited *Baumgardner*, *Laborers Local 158 (Worthy Bros.)*, and *Airports Service Lines* in support of its motion to strike.

There can be little dispute that the meaning or interpretation of the Board's remedial order which provided that framework for the Region's computation of backpay required that an attack on any of its elements be made by a specific denial under the Board's Rules and its decisions cited. This Respondent failed to do. Its failure to raise such a defense until its posthearing brief provides a sound basis to grant the General Counsel's motion, which I now do.

In its response to the motion, Respondent requests that if it is concluded that its actual cost defense was not dealt with at the hearing, that the General Counsel be provided an opportunity at a reopened hearing to present additional evidence and testimony on the issue. I deny this request. Respondent has not provided any compelling or legally sufficient reasons to reopen the hearing. It was never precluded from raising the disputed issue timely, and I will not allow a further hearing so that either party may litigate an issue that was never properly or timely raised in the first place. Furthermore, were I to have permitted Respondent to retain the argument in its brief or even engage in further litigation of the matter, I am convinced that it has no merit and its litigation would not be a fruitful endeavor.

Respondent's interpretation of the Board's use of the phrase "actual cost" is strained and irrational. It is self-evident that even under Respondent's reading of the phrase, the Board could not have intended discriminatees to have sought their own pension coverage in April 1976, when they reasonably believed themselves covered by the Union's plan. There is no hint in the Board's phrasing of the remedy or in any other portion of its Decision and Order that it was requiring discriminatees to actually purchase an annuity. "Actual cost" must surely have reference to the cost in dollars to obtain comparable pension coverage individually. That cost is dependent on the size or amount of the coverage or benefit being purchased as well as other factors such as age and mortality. It no doubt calls for actuarial computation before

a precise figure can be obtained. "Actual" thus must mean an application of these factors in the market place to procure a precise cost figure. Finally, without any knowledge or understanding of the Board's remedial order, none of the discriminatees would have had the information necessary to intelligently place an order for an individual pension. That information would not have been available, at the earliest, until the issuance of the compliance specification on February 15, 1995, by which time, of course, the Region had already investigated and determined the "actual cost" with the aid of an actuary.

The main issue left for resolution is whether the Union's interpretation of the phrase "comparable pension coverage" appearing in the Board's remedial order constitutes a reasonable interpretation of the Board's Order.

Board law is well settled that any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances, *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980). The Board's discretion is broad in its selection of a backpay formula that is reasonably designed to produce approximation of backpay due. *Bagel Bakers of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970). When presented with both backpay and alternate backpay formulas, an administrative law judge must determine which is the "most accurate" method to determine backpay, *W. L. Miller Co.*, 306 NLRB 936 (1992). Finally, it is also well established that even though uncertainties or ambiguities may appear, it is the wrongdoer responsible for their existence, rather than the innocent backpay claimant, against whom they are rightfully to be resolved, *Iron Workers Local 15*, 298 NLRB 445 (1990); *WHLI Radio*, 233 NLRB 326, 329 (1977); *United Aircraft Corp.*, 204 NLRB 1068 (1973); and *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966).

I have previously summarized the positions of the General Counsel and Respondent in support of, and opposed to, the interpretation the specification places on the phrase "comparable pension coverage" in arriving at the backpay figures.

Far more persuasive in my estimation is the interpretation taken by the Government. First, under the dictionary meaning of the word, "comparable," the specifications interpretation is clearly superior. The Webster defines comparable as having enough like characteristics or qualities to make comparison appropriate, or permitting or inviting comparison often in one or two salient points. Webster's Third New International Dictionary 46 (1993) is preferable to definitions offered by Respondent from Black's Law Dictionary, defining "comparable" as "sufficiently similar to be regarded by an expert as of substantially equal value." Respondent also offers a definition of "equivalent," but that is not the word used in the Board's Order, as affirmed by the court.

Although Respondent's expert witness testified that the Union's pension plan and the individual pensions or annuities which form the basis for the Board's awards were not comparable, he continued to rely in so answering on the distinguishing feature of the Union's plan, the termination discount, arising from the fact that many in the group will never achieve eligibility or vesting although contributions have been made on their behalf, while minimizing or ignoring those factors which are common to both types, such as in-

vestment gains achieved in both, and mortality gains, achieved from early death before the benefit is payable in the case of both. These common factors make the two types of plans "comparable" as each provides a benefit on retirement and its cost can be measured and fixed by application of actuarial principles.

It is also inconceivable that the Board would have provided a remedy that would include self-defeating conditions that could void any reasonable recovery for the discriminatees. Such would be the case would the "comparable pension coverage" have required a vesting provision conditioning payment of a benefit on 10 or even 5 years of payments within a certain number of years. Under the Union's interpretation, a discriminatee could suffer the complete loss of his own investment were he to fail to make the requisite consecutive payments. Such a result would severely limit and make ineffective a remedy designed insofar as possible, to place these employees in a position they would have been had there been no unfair labor practice. See page 2, supra. See also *NLRB v. J. H. Rutter Rex Mfg. Co.*, 396 U.S. 258 (1969). The remedy the Board has provided, giving the discriminatees the opportunity to recoup the difference in cost of purchasing alternate coverage after they became aware of the fraud committed against them, would become a nullity under the Respondent's narrow interpretation. After all, it was the Union which deprived them of a choice. Under these circumstances, the Union's plan, with its features designed to maximize benefits for those who achieve a longevity of service, should not be the model which the employees must follow. Thus, I conclude the interpretation contained in the specification is more accurate and more closely achieves the Act's objective of making the discriminatees whole.

Even under the Respondent's interpretation, five of the discriminatees, at least, would have achieved vesting, and therefore entitlement to a pension under the Union's plan, assuming contributions had been made on their behalf. Thus, the Union's defense in this regard is ineffective to defeat recovery for them. It is also unclear, although unable to be determined on this record, whether any other discriminatees would be able to achieve vesting based on their full work history to retirement. Thus, Respondent failed to show, e.g., that individuals with at least 2 years working at Coastal, did not then work at covered employers, as the result of which their combined service would not have provided them with a reciprocal, vested pension and they would have sustained a break in service. It was Respondent's burden to furnish the appropriate supporting figures, to show that most discriminatees were not, or would not be, entitled to a vested pension. In this connection, it is interesting to note that discriminatee Leslie Trinity was receiving a union pension at the time of the hearing, although his work history for Coastal showed only 3-1/4 years of service. His earlier years of service for Anchor Motor Freight, for which he received service credits, were sufficient alone to provide him with a vested pension.

Respondent's defense on the meaning of comparable pension coverage is rejected for other reasons. Respondent had the opportunity but never sought clarification of the meaning of the remedial order, even after December 6, 1993, when Compliance Officer Wilson made its counsel aware of the interpretation governing the award of backpay. Finally, Respondent never considered preparing an alternative formula,

including the vesting and break-in-service requirements of the Union's plan. (Tr. 75-76.) Respondent has thus failed to comply with the pleading requirement contained in the Board's Rule in Section 102.56(b) mandating that it set forth in detail its formula and the appropriate supporting factors, showing how it impacts on the award for these discriminatees. For that reason, Respondent's alternate formula, its alternate interpretation of the Board's remedial order, must be rejected. See *Baumgardner, Laborers Local 158*, and *Airports Service Lines*, cited supra.

During the hearing Respondent successfully moved to amend its answer to add an affirmative defense that the discriminatees were not entitled to interest on any backpay award for the period from the issuance of the enforcement order by the court of appeals, on January 3, 1990, until the date of the Respondent's backpay specification demand letter, on December 6, 1993. While permitting the amendment and Respondent's litigation of the issue, I conclude now that it lacks merit. First, the law is clear that the Board is not required to "place the consequences of its delay, even if inordinate, upon wronged employees, to the benefit of wrong doing employers." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, cited supra at 264-265.

Second, it is not altogether clear that the delay of almost 3 years was inordinate, or that it was the Board's responsibility. It is clear that the Region supplied Respondent's counsel with detailed facts regarding its interpretation of the Board's remedial order and its impact on the discriminatees, including provision for interest from December 1985 as early as April 30, 1991. Yet, Respondent, then aware, within 15 months of the court's enforcement order, of the full parameters of the Region's intended compliance specification, failed to respond or to engage its own actuary to provide it with an estimate of backpay due. The preparation of this specification required use of secondary data in the absence of payroll records, which, in all likelihood played a significant role in extending its final preparation. Respondent had a right to dispute the specification's formula and theory, but it should not be allowed to benefit from a delay at least partially occasioned by its ignoring the Region's correspondence and its failure to engage in a meaningful dialogue with the Region, by precluding interest on awards for the benefit of discriminatees wronged in the first place by Respondent's unlawful conduct. As noted, by Administrative Law Judge Walter J. Alprin, in denying a Respondent claim for similar relief, a ruling fully affirmed by the Board for the reasons stated in the judge's decision: "The Respondent has been the beneficiary of the retained backpay for this period of time [from the time of violation in 1977 until Court enforcement order in 1982]. There is no reason why interest on backpay in this matter should inure to its benefit rather than to the benefit of those former employees which it wronged." *Smythe Mfg. Co.*, 277 NLRB 680, 684, 692 (1985).

Turning finally to my proposed Order, I will recommend that Respondent make whole all the discriminatees, except for Fred Ferro and Charles Corson, in accordance with the specification. As to Ferro, the evidence that Respondent provided, through the testimony of Ferro, warrants the conclusion that Ferro ceased employment permanently in 1979 when he became disabled, and thus should have been treated in the specification the same as Robert Bradshaw and Leslie Trinity, whose backpay periods ended on their retirements before December 1, 1985. The General Counsel may not have had the information prior to the hearing, but having learned of the disabling injury and Ferro's decision to permanently cease work in 1979, it was incumbent on it to seek an amended monthly benefit amount for Ferro, using as the second date, the month of his going out on permanent disability in 1979, and to seek a revised figure, based on the new second date, from the actuary. Whether that final figure, representing a difference in purchase price, would have changed is unclear. But until this matter is resolved Ferro's backpay cannot be fixed. Contrary to footnote 2 in the General Counsel's brief the date Ferro removed himself from employment because of his disability corresponds to the ending date of his employment and is, thus, a highly significant and relevant date, according to the General Counsel, in fixing Ferro's backpay under the formula used.

As to Corson, I have found Respondent's evidence, contained in Corson's social security report, sufficient to have overcome and eliminated the claimed earnings of a \$25.50 monthly pension in 1978 from employment at Coastal. This elimination reduces Corson's total monthly pension to \$399 and must surely change the actuary's computation of the difference in purchase price and thus his backpay award contained in appendix C. Corson's award should likewise be recomputed.

Accordingly, as to Ferro and Corson their final make whole remedy must await further computations by the General Counsel. See *Regional Import & Export Trucking Co.*, 318 NLRB 817 (1995), and *Hansen Bros. Enterprises*, 313 NLRB 599 (1993), where the Board used this procedure in similar circumstances.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, International Brotherhood of Teamsters, Local Union No. 469, AFL-CIO, its officers, agents, and representatives, shall

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

I. Make whole each of the discriminatees named in the compliance specification, except Fred Ferro and Charles Corson, by paying to each of them the amounts of backpay, appearing opposite their in the last column of appendix C of the specification, as amended, with interest thereon as accrued from January 1, 1986, to the dates of payment, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

II. The General Counsel shall recompute Fred Ferro's backpay award by using as the second, backpay ending date, the month in 1979 when Ferro left work permanently on dis-

ability, and obtaining a revised figure, representing the difference in purchase price and constituting Ferro's backpay award, to which interest shall be added as specified above.

III. The General Counsel shall also recompute Charles Corson's backpay award by eliminating his entitlement to a monthly pension of \$25.50 in 1978, and subjecting his revised monthly benefit amount of \$399 to a new actuarial review, obtaining thereby a revised figure, representing the difference in purchase price and constituting Corson's backpay award, to which interest shall be added as specified above.